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No. 90-203

In the Supreme Court of the United States

OCTOBER TERM, 1990

BARTHOLOMEW S. BERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial judge abused his discretion by denying a defense request for the production of witnesses.

2. Whether the admission during the government's rebuttal case of petitioner's positive urinalysis test result was harmless error.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 3a-7a) is reported at 30 M.J. 134. The opinion of the Air Force Court of Military Review (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on May 10, 1990. The petition for a writ of certiorari was filed on August 1, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at Yokota Air Base in Japan, petitioner, a member of the United States Air

Force, was convicted of using marijuana and distributing marijuana, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a. Petitioner was sentenced to confinement for four months, a fine of $4,000, a reduction in rank, and a bad conduct discharge. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence. Upon discretionary review, the Court of Military Appeals affirmed.

1. The evidence at trial showed that petitioner used and distributed marijuana on various occasions during 1987. Pet. App. 3. The questions presented in the petition relate to two evidentiary rulings at trial. First, petitioner contends that the trial judge erred in denying a defense request for the production of two witnesses who allegedly would have corroborated petitioner's account of the interrogation methods used against him. Second, petitioner argues that the erroneous admission of his positive urinalysis test result was not harmless error.

The principal evidence against petitioner was his January 3, 1988, confession to special agents of the Air Force Office of Special Investigations (OSI). PX 1. In his confession, which the defense unsuccessfully moved to suppress, petitioner admitted using marijuana on a number of occasions during 1987 and distributing marijuana to Staff Sergeant Steven Ladnyk on approximately seven occasions. PX 1. Petitioner's confession was corroborated by the testimony of Sergeant Ladnyk and Airman Jerry Smitherman. Pet. App. 4a, 7a; Tr. 115-124, 132-144; PX 2.

Petitioner's defense was that his confession was not adequately corroborated because Sergeant Ladnyk and Airman Smitherman were not credible witnesses. Tr. 110, 172. Petitioner also called Captain Linda Rollins, the medical urine testing program monitor at the Yokota Air

Base, who testified that petitioner's November 17, 1987, and January 4, 1988, urine samples were negative. Tr. 146-148; DX A. In rebuttal, the government offered Prosecution Exhibit 3, a laboratory report showing the presence of the marijuana metabolite in a urine sample collected from petitioner on January 3, 1988. Over defense objection, the trial judge admitted the exhibit. Tr. 169-170.

Petitioner said that he was considering calling Sergeant Leonard Booker. Tr. 12-32. At that point, the government had yet to offer evidence in opposition to the suppression motion. Defense counsel said he had submitted a request to the local Staff Judge Advocate that Sergeant Booker be given immunity.[1] Defense counsel indicated that the OSI had interviewed Sergeant Booker as a witness, not a suspect, but that Sergeant Booker could nonetheless give evidence concerning the OSI's methods of questioning. Tr. 32. The trial judge suggested that the matter should be raised after the government had presented its case on the suppression motion, and the defense deferred resolution of the issue until then. Tr. 31-32.

The government's evidence on the motion included testimony from the two OSI agents who questioned petitioner when he confessed. They denied engaging in the following practices: lying to subjects, promising a suspect leniency in exchange for his cooperation, and threatening a suspect if he did not cooperate. Tr. 46-47, 56-57, 67-69. After the government had rested, defense counsel again asked that Sergeant Booker be granted use immunity and be produced as a defense witness. The trial judge held that Sergeant Booker's testimony was not relevant. Tr. 96. Defense counsel subsequently made an offer of proof that

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[1] The status and resolution of that request were never clarified in the record.

Sergeant Booker would have said that (1) he was questioned by the OSI as a witness without being advised of his rights; (2) Special Agent Carroll, one of the agents who questioned petitioner, participated in the interview of Sergeant Booker; (3) Sergeant Booker was questioned for approximately two and one-half hours; and (4) the agents persisted in their questioning even after Sergeant Booker said that he knew nothing. Tr. 97.

Defense counsel then expressed a desire to call as a witness a former OSI agent to testify about OSI practices and policies. Tr. 96-99. In particular, the agent would say that it was common for agents to lie in order to induce a suspect to talk. Tr. 98. Defense counsel conceded, however, that his witness could not offer any testimony about the practices of the OSI detachment at the Yokota Air Base during the relevant time, or about the interrogation methods of the agents who questioned petitioner. Tr. 99. The trial judge held that the proffered testimony was collateral to the issues. Tr. 99-100.

2. In the court of military review, petitioner argued that the trial judge erred by admitting petitioner's urinalysis test results. Petitioner did not claim that the trial judge erred by not ordering the defense witnesses to be produced.[2] In a memorandum opinion, the court of military review affirmed the findings and sentence. Pet. App. 2a.

3. Petitioner then sought review in the Court of Military Appeals on both the urinalysis and the witness production issues, but that court limited its review to the urinalysis issue. The court agreed with petitioner that his

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[2] In his assignment of errors to the court of military review, petitioner did not expressly raise this claim, but "invited the court's attention" to this matter. Whether that is an appropriate method for raising issues before the Air Force Court of Military Review is a matter of ongoing controversy that is the subject of a proposed change to that court's internal rules.

urinalysis test result should not have been admitted in rebuttal, since the government did not establish a proper chain of custody. Pet. App. 6a-7a. The court concluded, however, that the error was harmless. The court specifically observed that "[t]he prosecution case was strong and included a detailed confession by [petitioner], which dovetailed with the corroborating testimony of two prosecution witnesses." *Id.* at 7a.

ARGUMENT

1. Petitioner claims that the trial judge erred in ruling that the testimony of his proposed witnesses was irrelevant. Pet. 3-4.[1] In particular, petitioner claims that the testimony of the former OSI agent would have rebutted

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[1] It is not clear that this question is subject to review in this Court. The statutes authorizing this Court to review by a writ of certiorari the judgments of the Court of Military Appeals, 10 U.S.C. 867(h)(1) and 28 U.S.C. 1259(3), restrict this Court's certiorari jurisdiction to "decisions" of the Court of Military Appeals. Section 867(h)(1) of Title 10 further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory authority, which it exercised in this case, to limit its decision in any case to less than all of the questions presented by a defendant. 10 U.S.C. 867(d). Since the Court of Military Appeals accepted for review only the urinalysis issue and did not grant review on the witness production issue, there is a question whether that court rendered a "decision[ ]" on the first question that petitioner has presented in his petition, and whether the court's refusal to accept that question constituted an "action" of that court "in refusing to grant a petition for review" within the meaning of 10 U.S.C. 867(h)(1).

That question does not require an answer in this case, however, since the questions presented in the certiorari petition do not warrant review by this Court in any event.

the testimony of the OSI agents regarding their interrogation practices and procedures.[4]

Under military law, a servicemember is entitled to compel the attendance of witnesses who can offer relevant evidence in his behalf. See Art. 46, UCMJ, 10 U.S.C. 846; *United States* v. *Roberts*, 10 M.J. 308 (C.M.A. 1981). The witnesses in this case, however, did not have relevant testimony to offer. The defense theory at the suppression hearing was that petitioner was coerced into confessing. Neither defense witness would have materially supported that defense.

The proffered testimony of the former OSI agent was too far removed from the facts of this case. The former OSI agent did not participate in the questioning of petitioner; he had never been assigned to the Yokota Air Base; and he had no knowledge of the facts of petitioner's interview. Similarly, nothing Sergeant Booker proposed to say lent any credence to the defense theory. The fact that Sergeant Booker was questioned by an OSI agent who also questioned petitioner did not support the defense claim that petitioner was coerced into confessing. The sergeant was not present when petitioner was questioned, nor was he interviewed under similar circumstances. In any event, while Sergeant Booker maintained that the OSI agents continued to question him after he disavowed any knowl-

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[4] Petitioner also claims that the trial judge improperly required petitioner to show that his proposed witnesses did not have a motive to lie before the judge would order their production. Pet. 4. That claim misconstrues a comment made by the trial judge. After noting that Sergeant Booker may have been involved in misconduct relating to this case, the judge merely said that the defense could not offer one person with a "neutral and unbiased point of view" to support the defense claim that the OSI agents coerced the confession from petitioner. Tr. 99. That comment did not constitute the legal basis for the judge's ruling. See generally Tr. 95-99.

edge relevant to their investigation, he would not have testified that the agents had mistreated or coerced him. And the fact that a professional investigator would tenaciously question a potential witness is unremarkable. Accordingly, Sergeant Booker's testimony was properly held to be irrelevant to petitioner's challenge to the voluntariness of his confession.

2. Petitioner complains that the Court of Military Appeals applied an improper harmless error standard, because that court considered the overall strength of the government's case and the defense case in determining that the error was harmless. Pet. 4. That claim is meritless, since harmless error analysis focuses on the entire record, which includes the government's case as well as the defense case. See *Delaware* v. *Van Arsdall*, 475 U.S. 673, 684 (1986); *United States* v. *Hasting*, 461 U.S. 499, 509 (1983). The Court of Military Appeals applied that standard here. Pet. App. 7a. Because the court applied the correct harmless error standard to the facts of this case, its fact-bound determination that the error in this case was harmless does not warrant review by this Court. See *Francis* v. *Franklin*, 471 U.S. 307, 326 n.10 (1985) ("The primary task of this Court upon review of a harmless-error determination by the court of appeals is to ensure that the court undertook a thorough inquiry and made clear the basis of its decision.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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